EDITOR'S NOTE

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QUESTION PRESENTED

Whether §541(c)(2) of the Bankruptcy Code, which by its express language only applies to property held in trust, excludes from the debtor's bankruptcy estate deferred compensation funds of the debtor on deposit with the Ohio Public Employees Deferred Compensation Program, which funds are not held in trust.?

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STATEMENT OF THE CASE

On May 11, 1988, Walter C. Leadbetter filed a petition for relief under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Ohio, Eastern Division. At the time of the commencement of his bankruptcy case Mr. Leadbetter was employed as a firefighter by the City of Lorain, Ohio and had, during the course of his employment, deferred approximately $3500.00 of his earnings through a program administered by the Ohio Public Employees Deferred Compensation Program, Petitioner herein.

On November 9, 1989, Marvin A. Sicherman, Trustee in Mr. Leadbetter's bankruptcy and Respondent herein, filed a Motion for Turnover Order against Walter C. Leadbetter and the Ohio Public Employees Deferred Compensation Program seeking a turnover of the debtor's contributions to said program as of the date of the debtor's bankruptcy and all income or interest earned thereon to the date of turnover. The debtor did not file an objection to the Trustee's Motion. However, the Motion for Turnover Order was opposed by Petitioner who alleged that pursuant to the provisions of 26 U.S.C. §457(b)(6) the debtor held no interest in the property.

Upon review of the briefs submitted by the both parties, the bankruptcy court found that the funds on deposit in the debtor's account with the plan were voluntarily contributed by the debtor, that the debtor had not claimed an exemption therein, that the plan was promulgated by the Ohio legislature pursuant to the provisions of 26 U.S.C. §457, and that the debtor had made no withdrawals from the funds since they were deposited. Leadbetter, Petition at A-8.

After an analysis of §541(a)(1) of the Bankruptcy Code, the Plan document, and §457 of the Internal Revenue Code, the bankruptcy court determined that the debtor had an interest in the funds and that, pursuant to §541(a)(1) of

the Bankruptcy Code, which provides that the debtor's bankruptcy estate is composed of all legal or equitable interests of the debtor in property as of the commencement of the case, the deferred income was, as a matter of law, property of the debtor's bankruptcy estate.

Examining §541(c)(2), the only provision which would allow an exclusion of estate property under §541, the bankruptcy court determined that §541(c)(2) provides an exclusion where the debtor's beneficial interest in a trust is enforceable under applicable nonbankruptcy law. The bankruptcy court then found that the Ohio Public Employees Deferred Compensation Program was not a trust and that §541(c)(2) was not applicable to the present matter. The bankruptcy court further concluded that §541(c)(2) would not have operated to exclude the property from the debtor's estate because it provided an exclusion for traditional spendthrift trusts. Because the Ohio Public Employees Deferred Compensation Program did not constitute a spendthrift trust the bankruptcy court found it would not have been excludible from the debtor's bankruptcy estate under §541(c)(2). Leadbetter, Petition at a-12 to A-14.

The District Court affirmed the decision of the bankruptcy court for the reasons set forth in the bankruptcy court opinion and order. Petition at A-5 to A-6). In the Sixth Circuit Court of Appeals, Petitioner acknowledged that the Ohio Public Employees Deferred Compensation Program was not a trust. Appendix at A-3 to A-4. On October 21, 1991, the Sixth Circuit affirmed the judgment of the district court. In its per curiam decision, focusing solely on the issue of whether the deferred funds constitute property of the estate under §541(a)(1) of the Bankruptcy Code, the Court of Appeals agreed, for the reasons set forth in the bankruptcy court opinion, that the deferred funds were property of the bankruptcy estate. Petition at A-2. On November 14, 1991, Petitioner

filed a Suggestion for Rehearing En Banc with the Court of Appeals. (Appendix - A-24). On December 19, 1991, the Sixth Circuit issued an Order denying this request. Subsequently, on December 30, 1991, the Sixth Circuit Court of Appeals issued its mandate affirming the decision of the courts below. On March 17, 1992, Petitioner filed a Petition for Writ of Certiorari with this Court.

SUMMARY OF THE ARGUMENT

I. THERE IS NO COMPELLING REASON TO GRANT CERTIORARI IN THIS CASE BECAUSE THIS COURT HAS PREVIOUSLY GRANTED CERTIORARI IN ANOTHER CASE TO RESOLVE THE CONFLICT AMONG THE CIRCUITS OVER THE MEANING OF THE PHRASE "APPLICABLE NONBANKRUPTCY LAW" IN §541(c)(2) OF THE BANKRUPTCY CODE.

Petitioner has urged this Court to grant a writ of certiorari in this case to address an issue of statutory interpretation involving the use of the phrase "applicable nonbankruptcy law" in §541(c)(2) of the Bankruptcy Code. A conflict among the Circuit Courts of Appeals exists on that issue. The majority of the Circuit Courts of Appeals have held that Congress intended by its reference to "applicable nonbankruptcy law" to exempt from the bankruptcy estate only those spendthrift trusts which would have been beyond the reach of creditors under state law. The Fourth and Sixth Circuits have held that ERISA, a federal law, falls within the ambit of the statutory language. This Court, has, however, recently granted certiorari in Patterson v. Shumate, 943 F.2d 362, (4th Cir. 1991), cert. granted, 60 U.S.L.W. 3498 (January 21, 1992) (No. 91-913), wherein it will address the precise issue which Petitioner raises in its Petition and resolve the conflict among the Circuits. Moreover, resolution of this conflict, as urged by Petitioner, will not be determinative of this case as this case does not involve a trust situation as required by §541(c)(2). Consequently, there is no compelling reason to grant certiorari in this case.

II. THE BANKRUPTCY COURT DETERMINED THAT THE OHIO PUBLIC EMPLOYEES DEFERRED COMPENSATION PROGRAM WAS NOT A TRUST, A FINDING WHICH HAS NOT BEEN CHALLENGED OR APPEALED BY PETITIONER, THUS, UNDER THE PLAIN AND UNAMBIGUOUS LANGUAGE OF THE STATUTE, §541(c)(2) OF THE BANKRUPTCY CODE IS NOT APPLICABLE TO THIS CASE.

The plain and unambiguous language of §541(c)(2) provides that "A restriction on the transfer of a debtor's beneficial interest in a trust which is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." [Emphasis added]. 11 U.S.C. §541(c)(2). The bankruptcy court below held that the Ohio Public Employees Deferred Compensation Program, Petitioner herein, was not a trust. This ruling was never contested or appealed by Petitioner. Indeed, Petitioner admitted in the Court of Appeals that it was not a trust. Consequently, §541(c)(2) of the Bankruptcy Code which only operates to exclude, under specified circumstances, a debtor's beneficial interest in a trust, was not applicable in this case. Consequently, the issue Petitioner asks this Court to resolve, the meaning of the phrase "applicable nonbankruptcy law" in §541(c)(2), would not be properly before this Court if certiorari were granted in this case.

III. PETITIONER'S FILING OF A BARE SUGGESTION FOR REHEARING IN BANC DID NOT TOLL THE TIME FOR FILING A PETITION FOR WRIT OF CERTIORARI, CONSEQUENTLY THE PETITION IS UNTIMELY AND THIS COURT LACKS JURISDICTION TO HEAR THIS CASE.

Congress has specified, in 28 U.S.C. §2101(c), that any petition for writ of certiorari to this Court must be filed within ninety days after the entry of judgment appealed from. This time limit is mandatory and jurisdictional. However, the filing of a timely petition for rehearing under Federal Appellate Rule 40 operates to suspend the finality of the judgment. Consequently, this Court has consistently treated timely petitions for rehearing as tolling the start of the period in which a petition for certiorari must be sought until rehearing is denied or a new judgment is entered on rehearing.

Suggestions for Rehearing in banc, however, merely direct the court to the desirability of an in banc review and do not require disposition by the Court. Consequently, it has been the consistent practice of this Court to treat suggestions for rehearing in banc which do not also include a petition for rehearing by the panel as not tolling the period for seeking certiorari. This Court's Rules specifically provide that a suggestion for rehearing in banc is not a petition for rehearing.

The Sixth Circuit entered its per curiam decision on October 21, 1991. Subsequently, the Petitioner filed a bare suggestion for rehearing in this case. Petitioner did not file a petition for rehearing, or even a petition for rehearing in banc. Consequently, the time for filing a petition for writ of certiorari was not tolled. Petitioner should have filed its petition within ninety days of October 21, 1991, or no later than January 20, 1992. Petitioner's petition, having been filed on March 17, 1992, was therefore untimely and must be dismissed by this Court for lack of jurisdiction.

ARGUMENT

I. THERE IS NO COMPELLING REASON TO GRANT CERTIORARI IN THIS CASE BECAUSE THIS COURT HAS PREVIOUSLY GRANTED CERTIORARI IN ANOTHER CASE TO RESOLVE THE CONFLICT AMONG THE CIRCUITS OVER THE MEANING OF THE PHRASE "APPLICABLE NONBANKRUPTCY LAW" IN §541(c)(2) OF THE BANKRUPTCY CODE.

Petitioner, Ohio Public Employees Deferred Compensation Program, urges this Court to grant certiorari in this case to address an important issue of statutory construction and provide a definitive interpretation as to the meaning of the phrase "applicable nonbankruptcy law" in §541(c)(2) of the Bankruptcy Code. This Court has, however, already granted certiorari in the case of Patterson v. Shumate, 943 F.2d, 362 (4th Cir. 1991), cert. granted, 60 U.S.L.W. 3498 (January 21, 1992) (No. 91-913), to decide precisely that issue.

The three subsections of §541 of the Bankruptcy Code define and delimit what constitutes property of the bankruptcy estate which is created at the commencement of a bankruptcy case. Subsection (a) provides that the estate is comprised of "all legal and equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. §541(a)(1). In subsection (b) Congress specified certain exclusions from property of the estate. 11 U.S.C. §541(b). Finally, subsection (c) is the mechanism which insures that the debtor's interest in property becomes property of the estate, providing that:

> (c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law-
>
> (A) that restricts or conditions transfer of such interest by the debtor; or
>
> (B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.
>
> (2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

11 U.S.C. §541(c). Thus, as the statutory language makes clear, the only exception to the broad sweep of §541(c)(1) is that found in §541(c)(2).

Petitioner relies on the existence of a conflict among the Circuit Courts of Appeal as to the meaning of the phrase "applicable nonbankruptcy law" in §541(c)(2) as the primary justification for the granting of the writ of certiorari in this case. Admittedly, there is a split among the Circuits on that issue. However, this Court still does not have a compelling need to decide the "Question Presented" because (1) it is already before this Court in Shumate

and (2) the issue presented by Petitioner is not applicable to this case because §541(c)(2) deals only with situations involving trusts and the funds are not held in trust in this case.

However, as relates to the split among the Circuits, a majority of the Circuit Courts of Appeal which have considered the language of §541(c)(2) have, after considering the overall scheme of the Bankruptcy Code, including the federal exemption provision, the legislative history of §541(c)(2), the previously recognized exemption for spendthrift trusts under the old Act, and the interplay between the Employee Retirement Income Security Act of 1974 (ERISA) and the Bankruptcy Code, concluded that "Congress intended by its reference to "applicable nonbankruptcy law" to exempt from the estate only those "spendthrift trusts" traditionally beyond the reach of creditors under state law. Matter of Goff, 706 F.2d 574, 582 (5th Cir. 1983); Regan v. Ross, 691 F.2d 81 (2nd Cir. 1982); In re Graham, 726 F.2d 1268 (8th Cir. 1984); In re Swanson, 873 F.2d 1121 (8th Cir. 1989); In re Daniel, 771 F.2d 1352 (9th Cir. 1985), cert. denied, 475 U.S. 1016 (1986); and In re Lichstral, 750 F.2d 1488 (11th Cir. 1985).

Recently, however, the Fourth Circuit, in In re Moore, 907 F.2d 1476, 1477 (4th Cir. 1990), rejected this view, holding that:

> "Applicable nonbankruptcy law" means precisely what it says: all laws, state and federal, under which a transfer restriction is enforceable. Nothing in the phrase "applicable nonbankruptcy law" or in the remainder of §541(c)(2) suggests that the phrase refers exclusively to state law, much less to state spendthrift trust law.

Shortly, thereafter, this interpretation of the language of §541(c)(2) was adopted by the Sixth Circuit Court of Appeals. In re Lucas, 924 F.2d 597 (6th Cir.), cert. denied, sub nom. Forbes v. Holiday Corp. Savings and Retirement Plan, 111 S.Ct. 2275 (1991). Thus, as Petitioner asserts, there exists a

well-defined split among the Circuit Courts of Appeal as to the meaning of the phrase "applicable nonbankruptcy law" as used in §541(c)(2) of the Bankruptcy Code.

In January, this Court granted certiorari in Patterson v. Shumate, 943 F.2d, 362 (4th Cir. 1991), cert. granted, 60 U.S.L.W. 3498 (January 21, 1992) (No. 91-913). In Shumate this Court will have before it the precise question which Petitioner raises in this case, providing this Court with the opportunity to resolve the conflict among the Circuits over §541(c)(2) of the Bankruptcy Code.

The debtor, Joseph Shumate, had been the president, chairman of the board, and majority shareholder of a corporation which administered an ERISA-qualified, employer-funded pension plan. The sole issue in that case is whether the debtor's interest in that plan, valued at $250,000.00, is excluded from the debtor's bankruptcy estate pursuant to §541(c)(2) of the Bankruptcy Code. The lower court, relying completely on state spendthrift trust law, held that the debtor's interest in the plan should be included in the debtor's bankruptcy estate because the Debtor's control over the pension plan had been so complete that it would not have qualified as a spendthrift trust under Virginia law. Shumate, 943 F.2d at 363.

Subsequently, the Fourth Circuit decided Moore, wherein it held that the phrase "applicable nonbankruptcy law" in §541(c)(2) was not limited to state spendthrift trust law, but meant all laws, state or federal which contained restrictions on the transfer of the debtor's beneficial interest in a trust, that ERISA constituted applicable nonbankruptcy law under §541(c)(2), and that a debtor's interest in an ERISA qualified pension plan was, by virtue of the

restrictions on transfer contained therein, excluded from the debtor's bankruptcy estate pursuant to §541(c)(2). Moore, 907 F.2d at 1477-79.

Thus, the appeal in Shumate required the Fourth Circuit to "revisit the question whether an interest in an ERISA-qualified pension plan (a trust) should be included as property of the debtor's estate, where the self-settled trust contains an ERISA imposed non-alienation provision, but otherwise would not qualify as a spendthrift trust under state law." Shumate, 943 F.2d at 362. Noting that ERISA non-alienation provisions are vigorously enforced, and relying on its prior holding in Moore, the Court reversed the decision of the lower court. It stated:

> We think it is not giving Moore undue weight to say that it stands for the proposition that all ERISA-qualified plans, which by definition have a non-alienation provision, constitute "applicable nonbankruptcy law" and contain enforceable restrictions on the transfer of pension interests. That conclusion rests not on the reality of the particular beneficiary-settlor-trust relationship in issue, but instead on the status of the plan as ERISA-qualified. Consequently, Shumate's interest in the pension plan should be excluded under §541(c)(2).

Shumate, 943 F.2d at 365. Central to the Court's holding was its analysis of §541(c)(2) of the Bankruptcy Code:

> In enacting the Code, Congress sought to define broadly a debtor's estate, but also recognized that certain property should be excluded from the estate. See 11 U.S.C. §541(b), (c)(2). One class of property universally recognized as not included is a debtor's interest in a spendthrift trust. Courts have so held because §541 mandates that where trusts contain enforceable restrictions on transfer of a beneficial interest, those restrictions must be recognized in bankruptcy and there operate to exclude the interest from the debtor's estate. As this Court made clear in Moore, we see no reason to restrict §541(c)(2)'s exclusion provision to spendthrift trusts.

Shumate, 943 F.2d at 365. Obviously, the ruling of the Fourth Circuit in Shumate rests squarely on its interpretation of the phrase "applicable nonbankruptcy law" as it is used in §541(c)(2).

In essence, the Shumate case is a microcosm of the conflict among the Circuit Courts of Appeal over the proper interpretation of the phrase "applicable non bankruptcy law" in §541(c)(2). The lower court's ruling was based exclusively on state spendthrift trust law and follows the interpretation adopted by the majority of the Circuit Courts of Appeal which limits application of §541(c)(2) to trusts that are enforceable only under state spendthrift trust law. The Court of Appeals reversed, holding that the restrictions found in ERISA, a federal statute, also fell within the ambit of the statutory language. Since Shumate will require this Court to address the very question urged by Petitioner and resolve the conflict among the Circuit Courts of Appeal, there is no compelling reason for this Court to grant certiorari in this case.

II. THE BANKRUPTCY COURT DETERMINED THAT THE OHIO PUBLIC EMPLOYEES DEFERRED COMPENSATION PROGRAM WAS NOT A TRUST, A FINDING WHICH HAS NOT BEEN CHALLENGED OR APPEALED BY PETITIONER, THUS, UNDER THE PLAIN AND UNAMBIGUOUS LANGUAGE OF THE STATUTE, §541(c)(2) OF THE BANKRUPTCY CODE IS NOT APPLICABLE TO THIS CASE.

This case is an inappropriate vehicle for deciding the proper meaning of the phrase "applicable nonbankruptcy law" in §541(c)(2) of the Bankruptcy Code because the Sixth Circuit did not apply §541(c)(2) in this case. Petitioner's characterization of this case as one involving §541(c)(2) rests entirely on language in the Sixth Circuit's per curiam decision wherein the appellate panel wrote:

> For the reasons stated by the bankruptcy court in its opinion of March 1, 1990, and adopted by the district court in its opinion of November 30, 1990, as amended on December 5, 1990, we agree that the deferred funds are the property of the bankruptcy estate.

In re Walter C. Leadbetter, (Ohio Public Employees Deferred Compensation Program v. Sicherman), Petition at A-1. Based solely on that language, Petitioner argues that the Sixth Circuit reversed its prior holding in In re Lucas, 924

F.2d 597, 601 (6th Cir.), cert. denied, sub nom. Forbes v. Holiday Corp. Savings and Retirement Plan, 111 S.Ct. 2275 (1991), wherein the court had held that the phrase "applicable nonbankruptcy law" found in §541(c)(2) of the Bankruptcy Code was not limited to state spendthrift trust law, determining instead that the phrase meant all law, state and federal, under which a transfer restriction was enforceable. Petitioner is, admittedly, perplexed over how the appellate panel in this case, which included the circuit judge who wrote the Lucas decision, could have embraced, without explanation, a view which the court had expressly rejected six months earlier. Petition at 23-24. Petitioner's confusion lies in its refusal to recognize that under the facts of this case, §541(c)(2) does not apply. Simply put, the critical and determinative factual distinction is that in Lucas the funds at issue were held in a trust, whereas here the funds are not in a trust.

Petitioner's mischaracterization of this case rests, largely, on its reading out of §541(c)(2) the words "in a trust" and its exclusive focus on that portion of the bankruptcy court decision dealing with §541(c)(2). The bankruptcy court's analysis began within the framework established by §541 of the Bankruptcy Code, the provision which defines property of the estate.[1] Since, §541(a) provides, in pertinent part, that the estate created at the

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[1]/This analytical approach is compelled by the language of §541 of the Bankruptcy Code. The first subsection of this statutory provision provides that an estate is created upon the commencement of a bankruptcy case and describes the property which comprises the estate. 11 U.S.C. §541(a). Subsection (b) enumerates those items which Congress specifically determined would not be included in the estate. 11 U.S.C. §541(b). Finally, subsection (c) provides, with the narrow exception set forth in (c)(2), provides that an interest of the debtor becomes property of the estate notwithstanding provisions in agreements, transfer instruments, or applicable non-bankruptcy law which would, outside of bankruptcy, restrict the transfer of such interest to the estate. 11 U.S.C. §541(c). Consequently, before a court can determine whether or not inclusion of the property in the estate is barred by §541(c)(2), it must determine whether or not the property would be property of the estate under §541(a)(1).

commencement of a bankruptcy case consists of all "legal or equitable interests of the debtor in property as of the commencement of the case," 11 U.S.C. §541(a), the Court first determined whether the debtor had an interest in the deferred funds.[2] Petition, A-9. It found that the plan document provided several indications of the debtor's interest in the deferred funds:

> As a depositor in a deferred compensation program, one can readily surmise that the Debtor of any such depositor has an expectancy of a return of investments at some future date as a result of the very purpose of this type of program. Even §1.01 of The Plan expressly indicates that the account maintained by the employer reflects the "interest" of a participant under The Plan. Section 1.09 of The Plan address an emergency withdrawal as defined under Plan §4.04 which refers to emergency withdrawals being allowed upon the occurrence of an "unforeseeable emergency." Remarkably, that same section allows a distribution from the "participant's" account which further evidences an interest of the Debtor in the deposited funds. Further, §1.12 of The Plan, addressing "Includable Compensation" makes clear reference to the fact that the account funds refer to "the amount of an eligible employee's compensation from the employer for the taxable year. Moreover, §3.04 of the Plan recognizes the Debtor's interest or relationship to the deferred assets held by the State by characterizing the participant as a "general creditor" of the employer.

Leadbetter, Petition at A-9 to A-10. Additionally, the bankruptcy court found that the funds were accessible to the debtor, either for hardship withdrawals or for de minimus withdrawals, prior to termination of employment or reaching the

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[2]/It must be noted that §522 of the Bankruptcy Code empowers the debtor to exempt certain property from inclusion in the estate. In Ohio, a state which has, pursuant to §522(b), passed a law prohibiting election of the federal exemptions, Ohio Revised Code §2329.662, the debtor is entitled to exempt only that property specified in the Ohio exemption statute. Significantly, while Ohio's exemption statute contains specific exemptions for the Public Employees Retirement System, the Volunteer Firefighter's Dependents Fund, The Police & Firemen's Disability and Pension Fund, the State Teacher's Retirement System, the Public School Employees Retirement System and the Highway Patrol Retirement System, it contains no specific exemption for the Ohio Public Employees Deferred Compensation Program. Ohio Revised Code §2329.66(10)(a). However, a persons right to receive a payment under any pension, annuity, or similar plan or contract is, under Ohio Revised Code §2329.66(10)(b) exempt "to the extent reasonably necessary for the support of that person and any of his dependents." Because the Debtor in this case did not assert an exemption claim in the funds on deposit in his account with the Ohio Public Employees Deferred Compensation Program, the bankruptcy court did not have to consider the applicability or impact of the Ohio exemption statute in this case.

age of 70-1/2 years. Leadbetter, Petition at A-10. A further indication that the Debtor had an interest in the deferred funds.

The bankruptcy court considered and rejected the argument advanced by the Ohio Public Employees Deferred Compensation Program, Petitioner herein, that under 26 U.S.C. §457 the debtor has no interest in the funds. Holding that this provision did not "diminish or avoid the Debtor's interest in the deferred Plan funds, it found that the language of 26 U.S.C. §457 clearly provided that "the active plan participant has, at a minimum, an inchoate interest in the deferred funds, but an interest nonetheless." [Emphasis added]. Leadbetter, Petition at A-10 to A-11. Consequently, the bankruptcy court held that "the Debtor's deferred income in the Plan constitutes estate property pursuant to 11 U.S.C. §541(a)(1)." Leadbetter, Petition at A-11.[3]

The bankruptcy court decision did not deal directly with the interpretation of §541(c)(2) as Petitioner argues. Rather, the bankruptcy court found §541(c)(2) to be inapplicable because of the absence of a trust. The bankruptcy court's consideration of §541(c)(2) was limited to whether any provision of the Bankruptcy Code barred recovery by the Trustee. Examining the precise language of §541(c)(2), it properly characterized the narrow nature of the §541(c)(2) exception by observing:

> Section 541(c)(2), as noted above, provides an exclusion from estate property where the debtor's beneficial interest in a trust is enforceable under applicable non-bankruptcy law. The phrase "applicable in non-bankruptcy law", however, has been interpreted narrowly as a reference to state spendthrift trust law which is not applicable to the present matter. Herein it is undisputed that the Plan is not a trust. In fact, §3.04 of the Plan provides that "no trust fund, bailment, or other

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3/Significantly, Petitioner's argument that the Sixth Circuit's ruling in this case "deprives the plan member of the ability to preserve these funds for the member's retirement" constitutes an admission that the Debtor has an interest in these funds. Petition, p. 14.

> fiduciary relationship or property right shall be created by the existence of the Plan." (Citations omitted). [Emphasis added].

Leadbetter, Petition at A-11 to A-12. Thus, the bankruptcy court specifically found that the Ohio Public Employees Deferred Compensation Program did not constitute a trust. Consequently, §541(c)(2) was not applicable to prevent inclusion of the deferred funds in the debtor's bankruptcy estate.

Finally, despite the fact that the Ohio Public Employees Deferred Compensation Program, Petitioner herein, had made no reference to §541(c)(2) in its argument, the bankruptcy court merely considered the possible impact of §541(c)(2) on this case and determined there was no impact. It did so because it was the only provision which allowed an exclusion of estate property under §541 of the Bankruptcy Code. Leadbetter, Petition at A-12. Limiting the applicability of §541(c)(2) to trusts that were enforceable under state spendthrift trust law, the bankruptcy court concluded that:

> The subject Plan is, in fact, not a spendthrift trust which would be excludible from the estate under §541(c)(2). It merely is a qualified deferred compensation program which was not intended to provide for the maintenance and support of its beneficiaries. As argued by the state, its purpose is to provide certain tax benefits to the Plan participant. Further disqualifying the Plan as a spendthrift trust is the fact that the contributions to the fund, at least in part, were made by the Debtor who is also the Plan beneficiary. A self-settled trust is, generally, not a valid spendthrift trust. (Citations omitted).

Leadbetter, Petition at A-14. Clearly, since the Bankruptcy Court had determined that the funds were not a trust, §541(c)(2) was not applicable in this case and its subsequent analysis of §541(c)(2) was merely dicta.

In the Sixth Circuit, Petitioner admitted that the Ohio Public Employees Deferred Compensation Program, a plan enacted pursuant to the requirements of §457 of the Internal Revenue Code, did not constitute a trust. In its Brief, Petitioner wrote:

> The requirements of the federal law that authorizes the tax-deferred status of public employee deferred compensation plans are extremely different from those involved in the private plan in Lucas. Under 26 U.S.C. § 457 (West 1978 & Supp. 1990), Congress authorized the states to create deferred compensation programs. These programs were, in turn, authorized to adopt a "plan" [an "arrangement" or "agreement" between the program and eligible employees, see 26 C.F.R. §1.457-2(b)]. permitting government employees to defer the receipt of a portion of what would otherwise be compensation, subject to certain conditions, to avoid federal income taxation on the amounts deferred. The assets of these plans were not, however, required to be held in trust for the participants. Instead, Congress chose to impose several conditions upon disbursement which, if adopted by a plan, would allow the deferred amounts to be exempt from federal income taxation. These conditions were necessary because, absent the use of a trust, a participant would be automatically considered in "constructive receipt" of the amounts if they possessed access to them.

Appendix at A-3 to A-4. Clearly, the foregoing constitutes an admission that the plan at issue in this case was a state administered deferred compensation program which did not hold the deferred funds in trust.

The language of §541(c)(2) is explicit. The statutory exclusion contained therein only applies to "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law." 11 U.S.C. §541(c)(2). Since, the fact that the funds were not held in trust was admitted by Petitioner, under the plain language of the statute, Petitioner did not meet the prerequisite for application of §541(c)(2), and the Sixth Circuit did not have to consider that issue.

The narrow nature of the Sixth Circuit inquiry is evident in the language of its per curiam opinion. As noted above, the bankruptcy court had utilized a two step analysis, mandated by the form and language of §541 of the Bankruptcy Code, to reach its decision. First, it analyzed whether the Debtor's interest in the funds constituted property of the estate under §541(a)(1). Leadbetter, Petition at A-8 to A-11. Second, if it was property of the estate,

did any provision of the Bankruptcy Code preclude recovery by the trustee. Leadbetter, Petition at A-11 to A-14. The Sixth Circuit reviewed and decided only the first issue, as is abundantly clear from the language of its per curiam decision:

> Having carefully considered the arguments of counsel, and the briefs and joint appendix filed by the parties, we are unable to say that the district court erred in ordering the deferred funds to be included in the bankruptcy estate. ...Appellant also argues that pursuant to 26 U.S.C. §457 the deferred funds are not property of the debtor. This provision merely establishes that the debtor has no taxable interest in the deferred funds. It does not indicate whether he has a property interest for the purposes of the Bankruptcy Code. Thus we find no tension between the Tax Code, 26 U.S.C. §457, and the Bankruptcy Code, 11 U.S.C. §541(a)(1). [Emphasis added].

Leadbetter, Petition at A-2. The foregoing belies Petitioner's contention that the Sixth Circuit adopted the interpretation of §541(c)(2) of the Bankruptcy Code set forth in the bankruptcy court opinion.

Clearly, what Petitioner finds as a perplexing and unexplained flip flop in position by the Sixth Circuit is nothing of the kind. The court of appeals was able to make the obvious distinction between this case, involving a governmental plan whose own plan document indicated that no trust relationship existed, and Lucas, involving an ERISA-qualified plan holding retirement funds in trust as required under ERISA and the Internal Revenue Code. In Lucas the funds fell within the ambit of the §541(c)(2) exclusion from property of the estate. In this case, §541(c)(2) did not apply. Consequently, contrary to

Petitioner's assertion, this decision is not in conflict with the prior ruling of the Sixth Circuit Court of Appeals in Lucas.[4]

Indeed, the very fact that Petitioner is reduced to paraphrasing the language of the statute to try to bring this case within its parameters constitutes an acknowledgment that §541(c)(2), if read literally, does not apply in this case. Petitioner argues that "The bankruptcy court should give effect to federal and state laws which restrict the transfer of the beneficial interest of funds held in accounts created to ensure the availability of such funds for the contributor's retirement." [Emphasis added]. Petition, p.12. The statute clearly provides that §541(c)(2) is limited to "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law..." [Emphasis added]. 11 U.S.C.§541(c)(2).

It is a fundamental rule of statutory construction that in construing a statute a court must "give effect, if possible, to every clause and word of a statute." United States v. Menasche, 348 U.S. 528, 538-39 (1955) (quoting Montclair v. Ramsdell, 107 U.S. 147, 152 (1883). Construing the statute to give effect to its plain language, unless the debtor's account with the Ohio Public Employees Deferred Compensation Program constitutes a trust, the §541(c)(2) exclusion cannot apply. The bankruptcy court below made a specific determination that the Ohio Public Employees Deferred Compensation Program was

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4/Further, this case is not in conflict with any decision by any of the other Circuit Courts of Appeal cited by Petitioner. Like Lucas, In re Moore, 907 F.2d 1476 (4th Cir. 1990), Matter of Goff, 706 F.2d 574 (5th Cir. 1983), In re Graham, 726 F.2d 1268 (8th Cir. 1984), In re Daniel, 771 F.2d 1352 (9th Cir. 1985) cert. denied, 475 U.S. 1016 (1986), and In re Lichstrahl, 750 F.2d 1488 (11th Cir. 1985) dealt with a debtor's interest in an ERISA-qualified plan. The retirement system in Regan v. Ross, 691 F.2d 81 (2d Cir. 1982) and, it would appear, the retirement system in In re Swanson, 873 F.2d 1121 (8th Cir. 1989), had qualified under §401(a)(13)(A) of the Internal Revenue Code, the very first words of which, "A trust shall not constitute a qualified trust...", indicates that the funds at issue were held in trust. 26 U.S.C. §401(a)(13)(A).

not a trust. Leadbetter, Petition at A-12. Petitioner never appealed nor contested that determination. Because the funds at issue are not held in a trust, §541(c)(2) is not applicable to this case. Consequently, the issue Petitioner asks this Court to resolve, the meaning of the phrase "applicable nonbankruptcy law" in §541(c)(2) of the Bankruptcy Code, would not be properly before this Court if certiorari were granted in this case.

III. PETITIONER'S FILING OF A BARE SUGGESTION FOR REHEARING IN BANC DID NOT TOLL THE TIME FOR FILING A PETITION FOR WRIT OF CERTIORARI, CONSEQUENTLY THE PETITION IS UNTIMELY AND THIS COURT LACKS JURISDICTION TO HEAR THIS CASE.

The time for filing a petition for writ of certiorari is specified by statute. Title 28 U.S.C. §2101(c) expressly provides, in pertinent part, that:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree.

28 U.S.C. §2101(c). This ninety day time limit for the filing of a petition for writ of certiorari is mandatory and jurisdictional. Missouri v. Jenkins, 110 S.Ct. 1651, 1660 (1991). Thus, unless petitioner's petition was filed within ninety days of the entry of the judgment of the Sixth Circuit Court of Appeals, this Court must dismiss the petition.

Petitioner indicates that it filed a Petition for Rehearing in Banc. Petition, p.2. However, Respondent believes that Petitioner filed a bare Suggestion for Rehearing in Banc. There is no provision in the Federal Rules of Appellate Procedure for the filing of a Petition for Rehearing in Banc. Rule 35 provides for the filing of a "suggestion" for a rehearing in banc, a mechanism whose primary purpose is to provide the court an opportunity to "secure or maintain uniformity of its decision" and to consider "questions of exceptional importance." (F.R. App. P. 35(a)). In addition, under Rule 40, a party may

petition the court for rehearing. The primary purpose of a petition for rehearing is to bring to the attention of the court "points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended." (F.R. App. P. 40(a)). Further, Rule 41 provides that "the timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court." (F.R. App. P. 41(a)).

This Court recently addressed the distinction between a suggestion for rehearing in banc and a petition for rehearing in Missouri v. Jenkins, 110 S.Ct. at 1660-62. As this Court noted the two pleadings serve distinctly different purposes:

> A petition for rehearing is designed to bring to the panel's attention points of law or fact that it may have overlooked. Federal Rule Appellate Procedure 40(a). The panel is required to consider the contentions in the petition for rehearing, if only to reject them. Rehearing in banc is a discretionary procedure employed only to address questions of exceptional importance or to maintain uniformity amongst circuit decisions. Federal Rule Appellate Procedure 35(a). As the reporter for the advisory committee drafting the Rules has observed "[A] party who desires a hearing or rehearing in banc may 'suggest' the appropriateness of such a hearing... The term 'suggest' was deliberately chosen to make it clear that a party's sole entitlement is to direct the attention of the court to the desirability of an in banc consideration. A suggestion is neither a petition nor a motion; consequently it requires no disposition by the court." WARD, The Federal Rules of Appellate Procedure, 28 Federal BJ. 100, 110-111 (1968); See also Moody v. Albemarle Paper Co., 417 U.S. 622, 625, 94 S.Ct. 2513, 2515, 41 L. Ed. 2d 358 (1974) (per curiam); Shenker v. Baltimore and Ohio R. Co., 374 U.S. 1, 5, 83 S.Ct. 1667, 1670, 10 L. Ed. 2d 709 (1969); Western Pacific R. Corp. v. Western Pacific R. Co., 345 U.S. 247, 258-259, 73 S.Ct. 656, 661-662, 97 L. Ed. 986 (1953). Consequently, Rule 35(c) specifically provides that the filing of a suggestion for rehearing in banc, unlike a petition for rehearing, "shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate".

Missouri v. Jenkins, 110 S.Ct. 1661-1662, n. 14.

Based upon this distinction it has been the consistent practice of this Court to treat petitions for rehearing timely presented to the courts of

appeals as tolling the start of the period in which a petition for certiorari must be sought until rehearing is denied or a new judgment is entered on the rehearing. Missouri v. Jenkins, 110 S.Ct. at 1660. A practice which recognizes that "[a] timely petition for rehearing... operates to suspend the finality of the... court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties." Department of Banking of Nebraska v. Pink, 317 U.S. 264, 266 (1942). However, as the Court noted:

> It has also been our consistent practice to treat suggestions for rehearing in banc presented to the United States Court of Appeals that do not also include petitions for rehearing by the panel as not tolling the period for seeking certiorari.

Missouri v. Jenkins, 110 S.Ct. at 1660.

This practice is expressly incorporated in the Supreme Court Rules. Rule 13.4 provides that:

> The time for filing a petition for a writ of certiorari runs from the date of judgment or decree sought to be reviewed as rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for writ of certiorari for all parties (whether or not they requested a rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the reentry of a subsequent judgment. A suggestion made to a United States court of appeals for a rehearing in banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule. [Emphasis added].

S.Ct. R. 13.4.

The record in this case clearly indicates that the Sixth Circuit issued its per curiam opinion on October 21, 1991. Subsequently, on or about November 14, 1991, with leave of the court of appeals, petitioner filed with the Sixth Circuit Court of Appeals a pleading captioned "Suggestion For Rehearing En

Banc". Appendix at A-24. Additionally, as required by Sixth Circuit Rule 14(b), the pleading contained a "required statement for rehearing en banc" wherein petitioner "expressed a belief, based on a reason to study professional judgment, that this appeal involves one or more questions of exceptional importance".[5] The suggestion for rehearing in banc identified two questions of exceptional importance:

> (1) The decision of the panel jeopardizes the tax-deferred status of funds held not only by this debtor but by all plans participants, not only in Ohio but in every state
>
> (2) The opinion below invests in the trustee in bankruptcy rights far beyond those anticipated or considered by the panel below, and beyond those permitted by law.

Appendix at A-26 and A-29. At no point in the pleading did the petitioner petition the Court for rehearing. Neither does the suggestion for rehearing comport with the requirements of Rule 40(a) of the Federal Rules of Appellate Procedure that a petition for rehearing shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked and misapprehended.

In short, it is clear that the pleading filed by petitioner subsequent to the entry of judgment on October 21, 1991, was a bare suggestion for rehearing in banc which did not toll the time for filing a petition for writ of certiorari. Absent the filing of a petition for rehearing in accordance with the requirements of Rule 40(a) of the Federal Rules of Appellate Procedure, petitioner's petition for writ of certiorari would have had to have been filed

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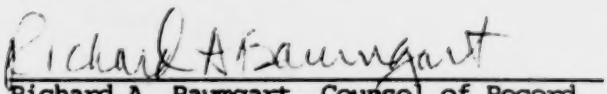
5/Indeed, it must be noted that Sixth Circuit Rule 14(b) provides a party seeking rehearing in banc the specific opportunity to suggest that the panel decision is contrary to another decision of the United States Court of Appeals for the Sixth Circuit and urge consideration to secure and maintain uniformity of decisions in this Court, an option which petitioner did not assert, despite his present contention that the Sixth Circuit decision in Lucas and this decision are in conflict.

in this Court within ninety days after October 21, 1991, or by January 20, 1992. Petitioner's petition was actually filed on March 17, 1992. Consequently, petitioner's petition does not comply with the requirements of 28 U.S.C. §2101(c) and this Court must dismiss the petition for lack of jurisdiction. Missouri v. Jenkins, 110 S.Ct. at 1660.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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ONARD GREEN, Clerk

CASE NO. 91-3076

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE WALTER C. LEADBETTER, et al.,
Debtors,

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION

BRIEF OF APPELLEE,
OHIO PUBLIC EMPLOYEES DEFERRED COMPENSATION PROGRAM

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(This statement should be placed immediately preceding the statement of issues contained in the brief of the party. See copy of 6th Cir. R. 25 on reverse side of this form.)

In re Walter C. Leadbetter Plaintiff-Appellant,	)	Case No. 91-3076
v.	)	
Defendant-Appellee	)	

DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 25, Ohio Public Employees Deferred Compensation Program (name of party) makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? No

   If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No

(Signature of Counsel)

4/30/94
(Date)

III. ISSUE ON APPEAL

May a Trustee in Bankruptcy force the turnover of the assets in a public employee's deferred compensation fund despite an express federal law requirement that all assets must remain *solely* the right and property of the *employer*, and where even the public employee could not have obtained access to the funds prior to his filing for bankruptcy?

IV. STATEMENT OF FACTS AND OF THE CASE

The present action was commenced upon the debtor, Walter C. Leadbetter's filing of a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on May 11, 1989. The debtor indicated in documentation filed with the Bankruptcy Court that as a public employee, he participated in the Ohio Public Employee's Deferred Compensation Program (Ohio Program). On November 9, 1989, Appellant, Marvin A. Sicherman, as Trustee in Bankruptcy for the debtor, filed a motion for turnover against the debtor and the Ohio Program for all amounts held by the Ohio Program as deferrals by the debtor. The Trustee's motion further stated that as of the date of the debtors' petition, the value of the deferred amounts was in excess of $3,500.00. However, to date, no determination of the actual amount in controversy has been made or is a part of the record.

The Ohio Program opposed the motion to turnover on the basis that both federal law and the Ohio Program's Plan Document specifically prohibit the debtor from possessing *any* right or interest in deferred amounts under the circumstances present in the debtor's case. However, on March 1, 1990, the Bankruptcy Court granted the Trustee's motion. The decision of the Bankruptcy Court was subsequently affirmed by the District Court on December 5, 1990. The Ohio Program now appeals the decision of the District Court, and respectfully requests that this Court remand the case to the Bankruptcy Court with direction to deny the Trustee's motion for turnover.

V. LAW AND ARGUMENT

A. FEDERAL LAW PLAINLY REQUIRES THAT ALL AMOUNTS THAT HAVE BEEN DEFERRED TO A PUBLIC EMPLOYEES DEFERRED COMPENSATION FUND MUST REMAIN *SOLELY* THE RIGHT AND PROPERTY OF THE EMPLOYER. THE AMOUNTS CANNOT, THEREFORE, CONSTITUTE PROPERTY OF THE DEBTOR'S ESTATE.

1. Introduction

This case presents many of the legal and policy considerations recently visited by this Court in *In re Lucas*, 924 F.2d 597 (6th Cir. 1991)—although, admittedly, with several differences. Like *Lucas*, the present case concerns whether the assets of a pension plan constitute property of the debtor's bankruptcy estate. Pursuant to 11 U.S.C. §541(a) (West 1979 & Supp. 1990), property in which the debtor holds a legal or equitable interest becomes a part of the bankrupt's estate, and therefore becomes subject to the control of the trustee. *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204–205, 103 S.Ct. 2309, 2313, 76 L.Ed.2d 515 (1983).

The requirements of the federal law that authorizes the tax-deferred status of public employee deferred compensation plans are, however, extremely different from those involved in the private plan in *Lucas*. Under 26 U.S.C. § 457 (West 1978 & Supp. 1990), Congress authorized the states to create deferred compensation programs. These programs were, in turn, authorized to adopt a "plan" [an "arrangement" or "agreement" between the program and eligible employees, *see* 26 C.F.R. §1.457-2(b)] permitting government employees to defer the receipt of a portion of what would otherwise be compensation, subject to certain conditions, to avoid

federal income taxation on the amounts deferred. The assets of these plans were not, however, required to be held in trust for the participants. Instead, Congress chose to impose several conditions upon disbursement which, if adopted by a plan, would allow the deferred amounts to be exempt from federal income taxation. These conditions were necessary because, absent the use of a trust, a participant would be automatically considered in "constructive receipt" of the amounts if they possessed access to them. *See e.g., Ross v. Commissioner*, 169 F.2d 483, 491 (1st Cir. 1948); *Paul V. Hornung*, 47 T.C. 428(A) (Tax Court 1967). Without these conditions, the amounts deferred would be includable as taxable income, and, thus, negate the congressional purpose for the section.

The most basic of these congressionally-imposed conditions is that amounts deferred must remain *solely* the property and rights of the *employer* until they are made available or actually distributed to the participant. 26 U.S.C. §457(b)(6) expressly provides:

> (b) ... For purposes of this section, the term "eligible deferred compensation plan" means a plan established and maintained by an eligible employer—
>
> ...
>
> (6) which provides that—
>
> (A) all amounts of compensation deferred under the plan,
>
> (B) all property and rights purchased with such amounts, and
>
> (C) all income attributable to such amounts, property, or rights, shall remain (until made available to the participant or other beneficiary) solely the property and rights *of the employer* (without being restricted to the provision of benefits under the plan), subject only to the claims of the *employer's* general creditors. (Emphasis added.)

In short, the assets of a "457 Plan" must be retained by the participant's employer. Thus, unlike the private plan involved in *Lucas*, the assets of a 457 Plan will not, admittedly, constitute "a *trust* that is enforceable under applicable non-bankruptcy law" under 11 U.S.C. § 541(c)(2). *Cf. In re Lucas*, at 600.

Furthermore, unlike the private plan involved in *Lucas*, the Ohio Program was established, and is operated in accordance with the provisions of Ohio Rev. Code §§ 145.71-.74 (Pages 1978 & Supp. 1990) which authorized the Ohio Program to operate a program of deferred compensation under 26 U.S.C. §457 (West 1978 & Supp. 1990). The Ohio Program was created by the Ohio General Assembly to provide a supplemental pension benefit for the public employees of the state and its political subdivisions. Ohio Rev. Code 145.71, .74. Thus, unlike the plan in *Lucas*, the Ohio Program is a "governmental plan," not subject to the anti-alienation provisions of the Employee Retirement Income Security Act[2] of 1974, 88 Stat. 829, as amended (ERISA), 29 U.S.C. §1001, *et seq.*

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2 The Ohio Program is exempted from most provisions of ERISA as a "governmental plan." 29 U.S.C. §1002(a)(32).

2. A 457 Plan's Assets Cannot Constitute a Part of the Debtor's Estate Because Congress Has Required that 457 Plan Assets Remain Solely the Right and Property of the Employer.

Given the distinctions between the public employee plan involved in this case, and the private plan in *Lucas*, the legal issue presented by this case is, essentially, a question of asset ownership. The Trustee argues that the debtor holds *some* ownership interest in the assets of the Ohio Program. Thus, he suggests, the assets must be turned over to the debtor's estate. However, as has been noted throughout the preceding discussion, Congress has specifically mandated that in order for a plan to maintain its tax-deferred status the plan must require that the assets remain *solely* the right and property of the participant's employer. 26 U.S.C. § 457(b)(6). Indeed, Congress has emphasized this sole ownership requirement by further mandating that the assets remain subject to the *employer's* general creditors. *Id.* If the amounts are subject to the employer's general creditors, Congress could not have intended that they be subject to the *employee's* creditor's as well. *Cf. In re Lucas*, at 603.

This Court's decision in *Lucas is* similar to the present case, however, in its recognition that it is a fundamental principle of statutory construction that unless exceptional circumstances dictate otherwise, "[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete." *In re Lucas* at 601, *quoting Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461, 107 S.Ct. 1855, 1860, 95 L.Ed.2d 404 (1987); *Rubin v. United States*, 449 U.S. 424, 430 (1981). Similarly, this Court has stated:

> [i]n determining the meaning of legislation, we must look to the plain language of the statute itself. If we find that the statute is unambiguous, then that language is regarded as conclusive unless there is express legislative intent to the contrary.

In re Lucas at 601, *quoting Bradley v. Austin*, 841 F.2d 1288, 1293 (6th Cir. 1988).

Section 457's requirement that the employer maintain *sole* ownership of the plan's assets unequivocally expresses Congress' intention that the pension assests remain secure for the benefit of both the participant and his dependents at retirement, without imposing the practical burdens of trust management on state governments. The Ohio Program has complied with this congressional mandate. *See* Plan Document, § 3.04. Therefore, the Trustee is not entitled to turnover of *any* of the Plan's assets.

3. A Trustee in Bankruptcy Possesses No Greater Rights In Property than Does the Debtor. Therefore, Since the Debtor Could Not Have Received a Distribution, Neither May the Trustee.

While the definition of property of the debtor's estate under 11 U.S.C. § 541(a) is, admittedly a broad one, the definition does not enlarge the Trustee's substantive property rights beyond those existing at the time that the debtor filed for bankruptcy. *In re N.S. Garrott & Sons*, 772 F.2d 462, 465–66 (8th Cir. 1985); *California Board of Equalization v. MGM Liquor Warehouse*, 52 B.R. 77, 80–81 (Bkrtcy.D.Minn. 1985); *Calvert v. Bongards Creameries*, 62 B.R. 526 (Bkrtcy.D.Minn. 1986); *In re Klayer*, 20 B.R. 270, 272 (Bkrtcy.W.D.Ky. 1981). Stated in a slightly different manner, it is

a "fundamental precept[] of bankruptcy law that the trustee should not have rights to property that the debtor did not have." *In re Wright*, 39 B.R. 623, 628 (D.S.C. 1983) (Syllabus, para. 4.) *See also South Carolina Livestock Dealers Inc. v. State Security Bank of Hedley*, 614 F.2d 1056, 1061 (5th Cir. 1980); *American National Bank v Huff*, 61 B.R. 678 (N.D.Ill. 1986); *Fair Department States Inc. v. Internal Revenue Service*, 26 B.R. 611 (S.D. Ala. 1982); *Georgia Pacific Corporation v. Sigma Service Corporation*, 22 B.R. 984, 985 (M.D.La. 1982); *Central Trust Co. v. Shepard*, 29 B.R. 928 (Bkrtcy.M.D.Fla. 1983); *Bernstein v. Sommer*, 28 B.R. 95 (Bkrtcy.D.Colo. 1983); *Douglas v. United States*, 10 B.R. 283 (Bkrtcy.D.Neb. 1981). To rule otherwise, one court has noted, would produce a most unfortunate irony—that the trustee could obtain the very funds that might have permitted the debtor to avoid bankruptcy had they been available to the debtor. *In re Wright* at 628.

This principle is far from novel: Its origins can be traced directly to the legislative history that underlies the Bankruptcy Act. In explaining the scope of Section 541, the Senate Report on this section of the Code states clearly that the trustee "could take no greater rights than the debtor himself had." S.Rep. No. 989, 85th Cong., 2d Sess. 82, *reprinted* in 1978 U.S. Code Cong. & Ad. New, 5787, 5868; *see also* H.R. Rep. No. 595, 85th Cong., lst Sess. 369 (1977). This Court has construed Section 541 in conformity with this legislative history. *Mid Atlantic Supply v. Three Rivers Aluminum Co.*, 790 F.2d 1121, 1124 (6th Cir. 1986).

As quoted previously, 26 U.S.C. § 457(b)(6) requires that all amounts remain solely the right and property of the participant's employer "until made available to the participant or other beneficiary." Section 457 only permits a participant to obtain deferred amount under three, very limited, circumstances:

> (1) In general.—For purposes of subsection (b)(5), a plan meets the distribution requirements of this subsection if—
> (A) under the plan amounts will not be made available to participants or beneficiaries earlier than—
> (i) the calendar year in which the participant attains age 70 1/2,
> (ii) when the participant is separated from service with the employer, or
> (iii) *when the participant is faced with an unforeseeable emergency* (determined in the manner prescribed by the Secretary in regulations). (Emphasis added.)

In accordance with these requirements, a participant may obtain a disbursement of deferred amounts when (1) he reaches the age of 70–1/2, (2) terminates his employment, or (3) is faced with an "unforeseeable emergency."

In the present instance, the debtor apparently had not terminated his employment at the time he filed his petition, nor had he attained the age of 70–1/2. The question, therefore, comes down to whether turnover of the amounts in question may be ordered as an "unforeseeable emergency."

As required by 26 U.S.C. §457(d)(1)(A)(iii), the Secretary of the Treasury has promulgated regulations restricting the disbursement of deferred amounts for reasons of unforeseeable emergency. Specifically, 26 C.F.R. §1.457–2(h) provides:

> (h)(1) ... The plan may not provide that amounts payable under the plan will be paid or made available to a participant or beneficiary before the participant separates from service with the Stata, or, if the plan provides for payment in the case of an unforeseeable emergency, before the participant incurs an unforeseeable emergency.
>
> ...
>
> (4) ...For purposes of this paragraph (h), an unforeseeable emergency is, and if the plan provides for payment in the case of an unforeseeable emergency must be defined in the plan as, severe financial hardship to the participant resulting from *a sudden and unexpected illness or accident* of the participant or of a dependent (as defined in section 152(a)) of the participant, loss of the participant's property *due to casualty*, or other similar *extraordinary and unforeseeable circumstances* arising as a result of events *beyond the control of the participant*. ...
>
> Examples of what are not considered an unforeseeable emergencies include the need to send a participant's child to college or the desire to purchase a home.
>
> (5) ...Withdrawals of amounts because of an unforeseeable emergency must only be permitted to the extent reasonably needed to satisfy the emergency need. (Emphasis added.)

Thus, under 26 C.F.R. §1.457-2(h)(4), where a plan provides for the disbursement of amounts because of an unforeseeable emergency, the plan must strictly limit the circumstances of such disbursements to instances where the hardship was caused by factors beyond the participant's control.

The Ohio Program's plan was adopted in accordance with this provision, and does provide for the withdrawal of deferred amounts in instances that meet the above standard. Under §4.04 of the Plan Document, a participant may apply to the Ohio Public Employees Deferred Compensation

Board (Board) for an emergency withdrawal.[1] The Board would then determine whether the participant's circumstances meet the requirements of 26 C.F.R. §1.457-2(h)(4) and (5) as an unforeseeable emergency. (Plan Document, §1.24.) Only where the Board determines that an unforeseeable emergency exists, will disbursement be allowed. The Board's determination is final and conclusive. *Id.*

In the present case, debtor has not apparently applied for withdrawal as an unforeseeable emergency of any amounts deferred. Thus, since none of the conditions for disbursement as set forth in 26 U.S.C. §457(d)(1) have been met, any amounts deferred do not constitute the property of the participant. *See e.g., Kirka v. Ohio Public Employees Deferred Comp.*, No. 89CV-02-779 (C.P. Franklin County July 25, 1989)(attached as Appendix 3). Such amounts, therefore, were solely the property of the debtor's employer at the time of filing, and cannot constitute property of the debtor's estate.

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1 In a decision rendered on September 5, 1990, the Bankruptcy Court for the Sourthern District, Eastern Division ordered turnover of Ohio Program funds in yet another virtually identical case. *See In re Council*, (attached as Appendix 2). The Court determined that turnover was appropriate because, it concluded, *all* bankruptcies by definition constituted an unforseeable emergency. This conclusion is inconsistent with both 26 C.F.R. 1.457-2(b). The Court's decision did not include any analysis along with this conclusion. However, in many instances the reason for the debtor's bankruptcy is the voluntary incursion of too much debt. In such instances, the debtor's bankruptcy was clearly a "foreseeable" event. The Ohio Program has appealed the decision in *Council*.

4. The Trustee's Claims of "Injustice to Creditors" Must Not Be Permitted to Triumph Over Clear Congress' Clear Statutory Requirement.

To date, each of the Trustee's arguments, have foucsed upon the "injustice" done to creditors by "labelling" the funds as solely the property and rights of the employer when—but for the participant's election to defer receipt of the amounts—the funds would otherwise have been includable as income of the participant. This argument is essentially the same argument presented, and rejected, in *In re Lucas, supra.* First, the "label" of employer ownship is not one of the employee's—or even the Ohio Program's—own making. These are *Congress'* plain and unambiguous words, and therefore, cannot be simply dismissed.

Second, the Trustee's argument that the amounts are a part of the debtor's estate essentially requests that this Court create an equitable exception to the provisions of 26 U.S.C. § 457(b)(6). This represents nothing less than a full force, frontal attack upon the long-recognized congressional policy favoring the uniformity and security of pension plans over almost all competing interests.

Although neither a bankruptcy case, nor a plan created under 26 U.S.C. §457, the U.S. Supreme Court has specifically rejected this same sort of equitable exception argument in the analogous ERISA context—while at the same time expressly recognizing Congress' policy favoring the security of retirement funds from other claimants.

In *Guidry v. Sheet Metal Pension Fund,* __ U.S. ___, 107 L.Ed. 2d 782 (1990), the Supreme Court held that even where a pensioner who also acted as

a fiduciary of a fund, had embezzled moneys from the fund, an equitable exception to ERISA's anti-alienation provision could not be created to effectuate a constructive trust in favor of the pension fund. As expressly noted by the Court:

> ...[W]e [do not] think it appropriate to approve any generalized equitable exception—either for employee malfeasance or for criminal conduct—to ERISA's prohibition on the assisgnment ofr alienation of pension benefits. Section 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task.
>
> As a general matter, courts should be loathe to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text.

Id.; 107 L.Ed. 2d. at 795 (footnote omitted); *see also* H.R. Rep. 93-807 93rd Cong., 2d Sess. 68 (1974) (congressional purpose was to "further ensure the employees accrued benefits are actually available for retirement purposes...."); H.R. Rep. 93-1280, 93rd Cong. 2d Sess. 280 (purpose was to protect retirement benefits from the claims of general creditors). If, under *Guidry*, even the criminal activity of the participant was not considered an adequate reason for such an equitable exception, surely the participant's bankruptcy cannot be either.

In the 457 Plan context, Congress has gone even further in securing the funds than it did on the ERISA context. Congress has, through 26 U.S.C. §457(b)(6), not merely prohibited the alienation of participant funds, but has prohibited the participant from even having an interest in the funds that is

capable of being alienated. Thus, Congress need not have prohibited alienation because the funds are solely the rights and property of the employer.

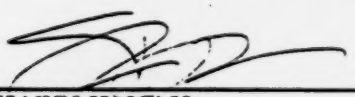
Finally, it must be noted that a "injustice" argument cuts both ways. As noted in passing by the Supreme Court in *Guidry*, the turnover of the deferred amounts may operate not only against the debtor, but also his innocent dependents—leaving them without an adequate retirement income. The mere argument that creditor's insterests are being unfairly harmed cannot justify not following Congress' clear mandate. The decision of the District Court should, therefore, be remanded.

VI. CONCLUSION

Therefore, in accordance with the clear import of the statute, legislative history, and case law, the Ohio Program respectfully requests that this Court remand the present case with instruction to deny the Trustee's motion for turnover of the Plan's assets.

Respectfully submitted,

ATTORNEY GENERAL LEE FISHER



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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Reply Memorandum has been sent by regular U.S. Mail postage prepaid, on this 1st day of May, 1991 addressed to:

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Lee Fisher

November 14, 1991

Clerk of Court
United States Court of Appeals
Sixth Circuit
503 U.S. Post Office & Courthouse
5th & Walnut Street
Cincinnati, Ohio 45202

Re: In Re: Walter C. Leadbetter, Debtor v. Ohio Public Employees Deferred Compensation Program
Case No. 91-3076

Dear Clerk:

Enclosed please find the original and twenty-five copies Suggestion for Rehearing En Banc to be filed in the above-referenced case.

Please time-stamp the additionally enclosed cover page and return it to me in the enclosed, pre-addressed envelope.

Thank you for your cooperation.

Very truly yours,

CHRISTOPHER B. MCNEIL
Assistant Attorney General
(614) 466-2980

CBM:kh

Enclosure

cc: Marvin A. Sicherman
Anthony J. Celebrezze, Jr.

No. 91-3076

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: WALTER C. LEADBETTER,	:	
Debtor,	:	
MARVIN A. SICHERMAN,	:	
Appellee	:	On Appeal From The United States District Court for the Northern District of Ohio
v.	:	
OHIO PUBLIC EMPLOYEES DEFERRED COMPENSATION PROGRAM,	:	
Appellant.	:	

SUGGESTION FOR REHEARING EN BANC

Appellant Ohio Public Employees Deferred Compensation Program (The Ohio Program) makes this suggestion for a rehearing en banc.

REQUIRED STATEMENT FOR REHEARING EN BANC

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. The opinion below finds "no tension" between the tax code, 26 U.S.C. Sec. 457, and the bankruptcy code, 11 U.S.C.

Sec. 541(a)(1); yet by construing funds maintained in The Ohio Program (through a "457" plan) as being the property of the debtor, the panel jeopardizes the tax-deferred status of funds held not only by this debtor but by all plan participants, not only in Ohio but in every state.

2. The opinion below invests in the trustee in bankruptcy rights to the turn-over of funds presently maintained and held not by the debtor, but by The Ohio Program; such investiture improperly but unavoidably grants in the trustee: (1) rights superior to that of the debtor, in that even the debtor could not reach these funds absent a finding of unforeseeable emergency (and in fact no such finding had been requested or made in this case); (2) rights superior to that of the debtor's secured and unsecured creditors, in that these funds are by law not the property of the debtor and are not subject to assignment or attachment and would not otherwise be attachable by the debtor's creditors; and (3) rights superior to those of the plan's (and the State of Ohio's) creditors, in that the trustee is empowered to invade an account which by statute holds property not of the plan participant (who holds at most only an inchoate interest in the funds he diverts to the plan), but of the State, creating the effect that bankruptcy will permit general unsecured creditors superior rights to the state's creditors (who by law are the only creditors whose rights are recognized under 26 U.S.C. Sec. 457), a result not recognized by the panel and one neither in keeping with the intention of the law nor the express and plain language of 26 U.S.C. Sec. 457.

MEMORANDUM IN SUPPORT

1. **The decision of the panel jeopardizes the tax-deferred status of funds held not only by this debtor but by all plans participants, not only in Ohio but in every state.**

As is reflected by the panel's decision, the district court below adopted the reasons offered by the bankruptcy court in that court's opinion of March 1, 1990 when it answered the question material to these proceedings and found that funds maintained by the Ohio Program and held pursuant to 26 U.S.C. Sec. 457 ("457 funds") were property of the debtor and as such were to be considered property of the estate in bankruptcy. As neither the district court not the panel below made any substantial comment regarding the opinion of the bankruptcy court, other than to approve the same after entertaining the arguments and briefs of the parties, it is to that order and the observations of the panel that this suggestion for rehearing is addressed.

The panel examines language in 26 U.S.C. 457, recognizes that the text describes the interest held by the plan participant, but concludes that such language "merely establishes that the debtor has no taxable interest in the deferred funds." The panel then reports that the cited section "does not indicate whether [the plan participant] has a property interest for the purposes of the bankruptcy code." From this observation, the panel concludes that "Thus, we find

no tension between the tax code, 26 U.S.C. Sec 457, and the bankruptcy code, 11. U.S.C. Sec. 541(a)(1)." The conclusion is reached, apparently, by implying that within 26 U.S.C. Sec. 457, there should have been more clear language establishing ownership of these funds while the funds are held by the state. This implication is not supportable: Sec. 457(b) provides that plans created under this law "shall remain (until made available to the participant or other beneficiary) solely the property and rights of the State (without being restricted to the provision of benefits under the plan) subject only to the claims of the State's general creditors."

The bankruptcy court reached its decision only by disregarding this language, and inferring that the participant's "inchoate interest" could ripen into a fully realizable and attachable interest by virtue of the act of seeking relief in bankruptcy. What that court was unmindful of was the violence such an interpretation does to the otherwise well-integrated and tightly constructed retirement plan envisioned under Sec. 457. The courts and panel below recognize no "tension" arising from such an interpretation, yet 457 plans must remain the property of the State or risk having the plan participant be considered by the Internal Revenue Service as being in "constructive receipt" of the amounts. As the panel and courts below construe the interest held by the plan participant, they remove the line which had clearly

separated the employee from his money: that line had been established by the language in Sec. 457, and now the courts below have concluded that such a line does not exist in the context of bankruptcy.

At present, more than $10 billion in assets are held in Sec. 475 plans, through over 110 governmental entities; and as the National Association of Government Deferred Compensation Administrators states in its amicus brief, if the plan participant is found to have sufficient interest in these "inchoate" contract rights as to be deemed in "constructive receipt" of all previously deferred amounts, the plan participants would be forced to pay income taxes on a lump-sum of several years' worth of deferrals. In such a case, the public employee would incur the tax liability while still employed, and thus while in the higher tax bracket than would be the case if he or she were to receive distribution of the moneys following retirement. In addition, plan administrators at many state and local levels are subject to administrative rules and statutes which expressly require that the plan's administrators maintain the tax-deferred status of the plan. A determination that the plan's assets are subject to turnover to a trustee in bankruptcy could, therefore, place the plan's administrators in violation of these statutes and ordinances.

2. **The opinion below invests in the trustee in bankruptcy rights far beyond those anticipated or considered by the panel below, and beyond those permitted by law.**

Separate from the question of whether the decision of the panel below will jeopardize the present tax status of The Ohio Program is the question of whether by its opinion the court has now empowered the trustee to reach far beyond that which the debtor and other parties could have reached but for the bankruptcy. As is set out more fully in the briefs below, participants may obtain these deferred funds only (a) in the calendar year in which the participant attains age 70 1/2; (b) when the participant is separated from service with the employer; or (c) when the participant is faced with an unforeseeable emergency (determined in the manner prescribed by the Secretary in regulations). 26 U.S.C. 457(b)(6). The debtor below has not reached his 70th birthday, he is still an employee of the state, and has made no request for a finding that he is faced with an unforeseeable emergency. He himself is precluded both by the above-cited statutory language and by the plan contract itself from having access to these funds. The experience of the plan administrators too would suggest that a voluntary bankruptcy, justified by improvident accumulation of unsecured debt, does not typically support a finding of "unforeseeable emergency." As a result, the state worker who could not qualify to obtain his contributions under

the contract need only deem himself insolvent and seek the protection of the bankruptcy court to obtain, through the trustee, access to his funds.

As was stated above, the funds held by The Ohio Program are neither attachable nor assignable. The result of this case, however, will be to obtain for the trustee plenary authority to escape the terms of this statutory provision: accordingly, in an involuntary bankruptcy, one foisted upon an individual by the requisite number of creditors who have knowledge of retirement funds held by a state worker, the trustee would be able to circumvent the anti-attachment provisions of Sec. 457 and seize the deferred retirement funds. The state worker who manages to save for his retirement should not have to suffer a fate worse than that of his counterpart in the private sector whose retirement account has not been threatened in like manner.

In addition, the holding expands the reach of the debtor's general creditors: Sec. 457 by its express terms subjects funds held by such programs "only to the claims of the employer's general creditors." 26 U.S.C. Sec. 457(b)(6)(C) If the trustee is permitted access to these deposits, he does so in derogation of the rights set forth in this quoted language, as the statute's text permits only the employer's, and not the employee's, creditors to have access to these funds.

Conclusion

The decision of the panel places in jeopardy not only The Ohio Program but Sec. 457 programs throughout the country, leaving each program at risk that it might lose its tax-deferred status, and immediately places thousands of plan participants at risk that they will have to pay taxes on sums which they diligently have been saving for their retirement. These plans were created to encourage savings by public sector employees, and now that purpose is being frustrated without there first being due consideration to the need to protect these plans. In addition, the decision strikes a critical blow to the protection of retirement funds from the grasp of creditors, and will encourage the premature depletion of the retirement savings of state employees by creditors (and by the employees themselves) who would not ordinarily be able to obtain access to those funds, all in contravention of the legislative intention set forth by Sec. 457.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Suggestion for Rehearing En Banc was sent by regular U.S. mail this 14th day of November, 1991 to: Marvin A. Sicherman, Dettlebach, Sicherman & Baumgart, 1100 Ohio Savings Plaza, Cleveland, Ohio 44114-3169, Trustee in Bankruptcy; and Anthony J. Celebrezze, Jr., Porter, Wright, Morris & Arthur, 41 South High Street, Columbus, Ohio 43215-3406, Counsel for Amicus Curiae.

CHRISTOPHER B. MCNEIL
Assistant Attorney General

1446A

OHIO REVISED CODE §2329.66(A)(10)(a)

Except in cases in which the person was convicted of or pleaded guilty to a violation of section 2921.41 of the Revised Code and in which an order for the withholding of restitution from such payments was issued under division (C)(2)(b) of that section, and only to the extent provided in the order, and except as provided in section 3113.21 of the Revised Code, the person's right to a pension, benefit, annuity, or retirement allowance and to accumulated contributions, as exempted by section 145.56, 146.13, 742.47, 3307.71, 3309.66, or 5505.22 of the Revised Code, and the person's right to benefits from the policemen and firemen's death benefit fund;

OHIO REVISED CODE §2329.66(A)(10)(b)

Except as provided in section 3113.21 of the Revised Code, the person's right to receive a payment under any pension, annuity, or similar plan or contract, not including a payment from a stock bonus or profit sharing plan or a payment included in division (A)(6)(b) or (10)(a) of this section, on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the person and any of his dependents, except if all the following apply:

(i) The plan or contract was established by or under the auspices of an insider that employed the person at the time his rights under the plan or contract arose;

(ii) The payment is on account of age or length of service;

(iii) The plan or contract is not qualified under the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C. 1, as amended.

OHIO REVISED CODE §2329.662

Pursuant to the "Bankruptcy Reform Act of 1978," 92 Stat. 2549, 11 U.S.C. 522(b)(1), this state specifically does not authorize debtors who are domiciled in this state to exempt the property specified in the "Bankruptcy Reform Act of 1978," 92 Stat. 2549, 11 U.S.C. 522(d).

26 U.S.C. §401(a)(13)(A)

In general. A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated. For purposes of the preceding sentence, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment made by any participant who is receiving benefits under the plan unless the assignment or alienation is made for purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 (relating to tax on prohibited transactions) by reason of section 4975(d)(1). This paragraph shall take effect on January 1, 1976 and shall not apply to assignments which were irrevocable on September 4, 1974.